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No. 87-875

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN P. REDDINGTON, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Appeals Council properly reopened the Administrative Law Judge's decision finding petitioner eligible for old-age insurance benefits under the Social Security Act, based on its finding of a clear error in the ALJ's decision.

2. Whether the Appeals Council correctly determined that petitioner had not accrued sufficient quarters of covered employment to be eligible for old-age insurance benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 825 F.2d 408 (Table). The order of the district court (Pet. App. 4a-16a) is reported at 640 F. Supp. 1005.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1987, and a petition for rehearing was denied on August 26, 1987 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on November 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In order to be eligible for old-age insurance benefits under the Social Security Act, an individual must have a sufficient number of quarters of covered employ-

ment to be "fully insured." 42 U.S.C. 402(a). Petitioner's application was denied by the Social Security Administration (SSA) at the initial determination and reconsideration stages on the ground that he did not have 31 quarters of coverage, as required by 42 U.S.C. 411(a)(1). Pet. App. 5a, 21a.

Petitioner then sought a hearing before an Administrative Law Judge (ALJ) in SSA's Office of Hearings and Appeals. The ALJ held that petitioner had 36 quarters of coverage and therefore was entitled to benefits (Pet. App. 19a-29a). Critical to this determination was the ALJ's inclusion of 12 quarters for the years 1978, 1979 and 1980 (*id.* at 28a-29a). During those years, petitioner received payments from a partnership, Greenmount Associates (GMA), of which he was a general partner (*id.* at 6a, 22a, 25a-26a). GMA owned and operated apartment complexes, and the partnership agreement provided for guaranteed payments to petitioner in return for management services (*id.* at 6a, 14a-15a). At the initial determination and reconsideration stages, SSA had concluded that this income was either rental income, which is excluded from coverage (see 42 U.S.C. 411(a)(1)), or self-employment income that, because of offsetting losses, yielded no *net* income giving rise to covered quarters (Pet. App. 23a-24a). The ALJ agreed that if petitioner was a self-employed "independent contractor" during this period, as petitioner contended (*id.* at 26a), he would have no net income (and thus no quarters of coverage) for that period, because of offsetting expenses and losses (*id.* at 27a). However, the ALJ concluded that petitioner was an employee of GMA from 1978 through 1980; that his income should be regarded as "wages" (with no offset for expenses and losses); and that he therefore was entitled to 12 quarters for those years (*id.* at 27a-29a).

b. The ALJ's decision was rendered on May 23, 1983 (Pet. App. 29a). A covering notice informed petitioner that the Appeals Council could, on its own motion, grant review of the ALJ's favorable decision within 60 days (*id.* at 17a-18a, citing 20 C.F.R. 404.969) and that the Appeals Council could reopen and revise the ALJ's decision even after 60 days if new and material evidence was discovered, if a clerical error had been made, or if "there is an error as to the decision on the face of the evidence on which it is based" (Pet. App. 18a, citing 20 C.F.R. 404.988).

The Appeals Council did not choose to *review* the ALJ's decision on its own motion within 60 days. But the Appeals Council subsequently did decide to *reopen* the ALJ's decision, because an error was brought to the Appeals Council's attention by the Northeastern Program Service Center, the component of SSA responsible for completing the paperwork necessary to determine the amount, if any, of benefits that would be payable pursuant to the ALJ's decision. By memorandum dated June 20, 1983, the Service Center referred the case back to the Office of Hearings and Appeals because, in its view, the ALJ's decision was "clearly contrary to the act and regulations" (Pet. App. 46a). The memorandum explained that under IRS Rev. Rul. 69-184, 1969-1 C.B. 256, which construed the provisions of the Federal Insurance Contributions Act (FICA), 26 U.S.C. (& Supp. III) 3101 *et seq.* that address the subject of payments made to a partner, members of a partnership are not to be treated as employees of the partnership, and income received by a partner who performs services for the partnership therefore cannot be treated as wages but instead must be treated as either income from a trade or business or self-employment income (Pet. App. 47a).

By letter dated December 9, 1983, the Appeals Council notified petitioner that, after considering the June 20, 1983, memorandum from the Service Center, it was

reopening the ALJ's decision because it was erroneous on its face (Pet. App. 43a-45a).[1] After affording petitioner an opportunity to submit additional evidence or legal arguments on the coverage question (*id.* at 44a), the Appeals Council rendered a new decision on January 24, 1984 (*id.* at 32a-38a). The Appeals Council concluded that petitioner did not have the requisite number of covered quarters because: (i) under FICA, a partner cannot be treated as an employee of the partnership; (ii) income received by a partner for services rendered to the partnership may be considered self-employment income only if the partnership is engaged in a trade or business; and (iii) in this case, the only income received by GMA (and therefore by petitioner) was rental income, which is excluded from self-employment earnings by 42 U.S.C. 411(a)(1) (Pet. App. 36a-37a).

2. a. Petitioner then sought judicial review in the United States District Court for the Eastern District of North Carolina, which granted summary judgment in favor of the Secretary (Pet. App. 4a-16a). Relying on *Zimmermann* v. *Heckler*, 774 F.2d 615, 617 (4th Cir. 1985), the court rejected petitioner's contention that the Appeals Council was without authority to reopen the ALJ's decision on its own motion (Pet. App. 8a). The court ex-

[1] Under 20 C.F.R. 404.988(b), SSA, on the basis of a finding of "good cause," may reopen a decision within four years of the initial determination on the claim for benefits. The four-year period runs from the date of the initial determination even where, as here, the claimant sought review of the initial determination by requesting reconsideration and an ALJ hearing. The standards for finding "good cause" to reopen are contained in 20 C.F.R. 404.989. In this case, the Appeals Council relied on 20 C.F.R. 404.989(a)(3), which provides that good cause will be found if "[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made."

plained that the Secretary's regulations provide for reopening within four years of the initial determination for "good cause," and that in this case there was "good cause" because the ALJ "clearly erred in characterizing the claimant as an 'employee' of GMA" (*ibid.*). On the merits, the district court stated that it was a close question whether petitioner's income from GMA must be excluded as rental income under 42 U.S.C. 411(a)(1) (Pet. App. 11a-14a). But the court found it unnecessary to resolve that question, because offsetting losses from GMA and other partnerships would in any event prevent petitioner from being credited with any *net* self-employment income (and therefore with any quarters of coverage) for 1979 and 1980 (*id.* at 15a).

b. The court of appeals affirmed (Pet. App. 1a-3a; 825 F.2d 408 (Table)), adopting "the sound reasoning of the district court" with respect to both the Appeals Council's reopening authority and petitioner's failure to establish coverage for the years 1979 and 1980 (*id.* at 2a). District Judge Hoffman, sitting by designation, concurred in the panel's ruling on the question of the Appeals Council's reopening authority because he was bound by the Fourth Circuit's prior decision in *Zimmermann*. However, he noted that the First Circuit held in *McCuin* v. *Secretary of Health & Human Services*, 817 F.2d 161 (1987), that only the claimant may request reopening. Pet. App. 3a.

ARGUMENT

The courts below correctly held that the Appeals Council was authorized, on its own motion, to reopen the ALJ's decision finding petitioner entitled to old-age insurance benefits. The majority of the courts of appeals have sustained the Secretary's interpretation of his own regulations to permit reopening on the Secretary's motion as well as on

the motion of the claimant. By contrast, the First Circuit held in *McCuin* that the regulations should be construed to permit only the claimant to request reopening. However, this circuit conflict does not warrant review, because the Secretary has announced his intention to revise the governing regulations to make clear that a decision may be reopened on the Secretary's own motion in appropriate circumstances.

1. Contrary to petitioner's contention (Pet. 10-13), the court of appeals was clearly correct in sustaining the Secretary's interpretation of his own regulations to permit reopening of a decision on the Secretary's motion as well as on the motion of the claimant. This Court has consistently held that judicial deference to administrative determinations is at its height where, as here, the question concerns the interpretation of the agency's own regulations. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Such deference is especially warranted in this case, because the Secretary's interpretation is manifestly reasonable and is supported by the decisions of three other courts of appeals. See *Fox* v. *Bowen*, No. 86-3608 (6th Cir. Dec. 28, 1987), slip op. 6; *Cieutat* v. *Bowen*, 824 F.2d 348, 352-353 (5th Cir. 1987); *Higginbotham* v. *Heckler*, 767 F.2d 408, 410 (8th Cir. 1985); *Munsinger* v. *Schweiker*, 709 F.2d 1212, 1214-1215 (8th Cir. 1983); *Zimmermann* v. *Heckler*, 774 F.2d 615, 617 (4th Cir. 1985). See also *Butterworth* v. *Bowen*, 796 F.2d 1379, 1384-1385 (11th Cir. 1986).

a. The language of the basic reopening regulation does not support petitioner's contention that only the claimant may request reopening. The relevant regulation, 20 C.F.R. 404.988, provides that a determination or decision "may be reopened" within 12 months of the initial deter-

mination for any reason (20 C.F.R. 404.988(a)), within four years for good cause (20 C.F.R. 404.988(b)), and at any time for certain enumerated reasons, such as if the decision was obtained by fraud or fault (20 C.F.R. 404.988(c)). In conferring this authority, Section 404.988 does not refer only to those determinations or decisions that are adverse to the claimant (the ones that claimants presumably would seek to have reopened); it refers without limitation to the reopening of any "determination, revised determination, decision, or revised decision." See *Cieutat*, 824 F.2d at 353. Moreover, some of the conditions for reopening, such as where the prior decision was obtained by fraud (20 C.F.R. 404.988(c)(1)), would almost invariably be invoked *only* by SSA on its own motion. *Fox*, slip op. 7; *Cieutat*, 824 F.2d at 356 n.12; *Munsinger*, 709 F.2d at 1215.

b. Contrary to the view of petitioner (Pet. 12-13) and the First Circuit in *McCuin* (817 F.2d at 174), this interpretation of the basic reopening regulation is not undermined by the preceding regulation, 20 C.F.R. 404.987. Subsection (a) of Section 404.987 informs the claimant that he must seek Appeals Council review of the ALJ's decision within 60 days. But it further states that "a determination or a decision made in your case may be reopened and revised" even after 60 days have passed. As in 20 C.F.R. 404.988, this language is not limited to those determinations and decisions that are adverse to the claimant or to situations in which the claimant might request reopening. Subsection (b) of 20 C.F.R. 404.987 then informs the claimant: "You may ask that a determination or a decision to which you were a party be revised." In *McCuin*, the First Circuit read the reference to "You" as an indication that the Secretary intended to vest the claimant with exclusive control over reopening. See 817 F.2d at 174. But as

the Sixth Circuit has recognized, "[t]he language in the section directed to 'you' was adopted in the 1980 recodification in an effort to make the regulations clearer and easier for public use" (*Fox*, slip op. 7, citing 45 Fed. Reg. 52078 (1980)). This statement of the *claimant's* rights in no way limits the authority of SSA to take action (such as the reopening in this case) that is not dependent upon any action by the claimant.

c. Nor does SSA's authority to *reopen* an ALJ decision render superfluous the provision in 20 C.F.R. 404.969 allowing the Appeals Council to *review* an ALJ decision within 60 days, as suggested by petitioner (Pet. 7, 9, 11, 14) and the First Circuit in *McCuin* (817 F.2d at 169-170). The reopening regulations apply to determinations and decisions rendered at *any* level of the four-stage administrative review process; by contrast, the Appeals Council's authority to review a decision on its own motion within 60 days applies only to decisions that were rendered by an ALJ. Any potential overlap between the two procedures therefore exists for only a small percentage of SSA's decisions. At the initial determination and reconsideration stages, there is no provision for own-motion review by an appellate body like the Appeals Council. Therefore, if SSA's own-motion reopening authority were read out of the regulations, as petitioner proposes, SSA would be deprived of the only means by which it can correct erroneous awards of benefits at the initial determination and reconsideration stages.[2]

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[2] Congress recognized the need for the Secretary to revise determinations rendered at the first two stages of the administrative review process when it enacted the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441. Under the disability programs, a state agency decides at the initial determination and reconsideration stages whether a person is under a disability. 42 U.S.C. 421(a). However, a decision by the state agency that a person is under

Moreover, own-motion reopening authority does not render own-motion review authority meaningless even at the ALJ stage. Direct review and reopening are separate procedural devices that are governed by distinct regulatory provisions and have differing purposes and timetables. The 60-day limitation on Appeals Council review of an ALJ's decision serves to fix the point at which the ALJ's decision becomes final; reopening permits correction of a substantial error in an otherwise final decision. Direct review is a routine procedure; reopening is an extraordinary one. *Cieutat*, 824 F.2d at 355-356 & nn.9-11; *Butterworth*, 796 F.2d at 1385. See also *Califano* v. *Sanders*, 430 U.S. 99, 101-102, 107-109 (1977). The difference between the two procedures is thus analogous to the difference in a civil case between an appeal and a motion for relief from judgment under Fed. R. Civ. P. 60(b). Review and reopening also differ greatly in their practical operation. We have been informed by the Department of Health and Human Services that the Appeals Council currently has the resources to screen only between 5% and 15% of all unappealed ALJ decisions for possible own-motion review within 60 days. This sample approach enables the Appeals Council to exercise some direct supervision and quality control over ALJ decisions within the 60-day period. See *DeLong* v. *Heckler*, 771 F.2d 266, 268

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a disability is actually implemented by SSA, which has the independent responsibility for determining whether the claimant satisfies other criteria (such as being fully insured under Title II) before certifying the claims for payment under 42 U.S.C. 405(i). In Section 304(c) of the 1980 Amendments (94 Stat. 455), Congress directed SSA to review 65% of the state disability determinations in favor of the claimant before those determinations are implemented by SSA. See 42 U.S.C. 421(c)(2) and (3). In addition, Congress made clear in 42 U.S.C. 421(c)(1) that the Secretary may, "on his own motion," review *any* determination by a state agency, either in favor of or adverse to the claimant and either "before or after any action is taken to implement such determination."

(7th Cir. 1985); H.R. Conf. Rep. 96-944, 96th Cong., 2d Sess. 57-58 (1980); S. Rep. 96-408, 96th Cong., 1st Sess. 53 (1979). But it does not foreclose the Appeals Council from thereafter correcting an error in an individual ALJ decision that was not screened for possible review but instead was brought to its attention by another component of SSA that discovered the error in the course of implementing the ALJ's decision, as in this case.

d. An interpretation of the regulations that permitted only a claimant to seek to reopen a prior decision also would introduce anomalies and asymmetry into the regulatory scheme. It is inconceivable, for example, that the Secretary intended to preclude SSA from reopening and revising a decision that the claimant procured by fraud, and yet the logic of petitioner's position would seem to require that conclusion. Similarly, it would be incongruous to suppose that the Secretary intended to afford the claimant a right to have SSA reopen a facially erroneous adverse decision, but to deny SSA the authority to reopen a decision that is favorable to the claimant if it contains a comparably obvious and serious error. That is especially so in light of the fact that a decision finding a claimant eligible for old-age, survivors or disability benefits typically results in monthly payments to the claimant for the indefinite future. There is no reason to believe that the Secretary intended to obligate SSA to perpetuate an error in a determination of entitlement by continuing to pay benefits even after the error has become apparent. Compare Fed. R. Civ. P. 60(b)(5) (providing for relief from judgment when "it is no longer equitable that the judgment should have prospective application").[3]

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[3] For this very reason, when Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, it specifically provided that SSA may terminate benefits if it concludes that the prior finding of disability "was in error" (42 U.S.C.

e. If there could be any remaining doubt regarding the proper construction of the reopening regulations, it is dispelled by the consistent administrative practice for virtually the entire history of the Social Security program. In 1940, the Social Security Board promulgated regulations to establish the four-stage administrative review process that remains in effect to this day. 5 Fed. Reg. 4169-4174. The 1940 regulations also contained a separate subsection providing for reopening and revision of decisions that had been rendered at any of the four stages of review. As relevant here, that subsection provided that "[a]ny decision of a referee or the Appeals Council * * * may be revised by the Appeals Council, either *upon the motion of the Appeals Council* or upon the petition of any party, when it clearly appears that there was an error of fact or law in such decision or that such decision was procured by fraud or misrepresentation" (20 C.F.R. 403.711(b) (emphasis added), as added, 5 Fed. Reg. 4174 (1940)).

This own-motion reopening authority in the 1940 regulation was carried forward over the next four decades. In fact, the First Circuit acknowledged in *McCuin* that "[p]rior to 1980, the regulations clearly gave the Appeals Council the right to reopen on its own initiative after the sixty-day time limit" (817 F.2d at 174, citing 20 C.F.R. 404.956, 404.957 (1978)). The First Circuit also acknowledged in *McCuin* that when the procedural regulations were revised in 1980 to make them more understandable, the Secretary stressed that " 'no substantive changes have been made' " (817 F.2d at 174, quoting 45 Fed. Reg.

(Supp. III) 423(f)(4)). See H.R. Rep. 98-618, 98th Cong., 2d Sess. 12 (1984) ("benefits which were improperly allowed originally should not be continued"). *A fortiori*, the procedural framework does not obligate SSA to pay benefits to an ineligible recipient even where the error is identified before any benefits have been paid.

52078 (1980)). This disclaimer refutes any notion that the current regulations should be construed to have dispensed, sub silentio, with SSA's longstanding authority to reopen decisions on its own motion. See *Fox*, slip op. 7; *Butterworth*, 796 F.2d at 1385.[4]

f. The court of appeals' ruling in this case is consistent with the rulings by three other courts of appeals that the Secretary may reopen an administrative decision on his own motion. See cases cited at page 6, *supra*. The First Circuit reached a contrary conclusion in *McCuin*. However, for a number of reasons, this circuit conflict does not warrant review by the Court at this time:

First, the question presented concerns the interpretation of the Secretary's regulations. There is no suggestion that the Social Security Act itself bars the Secretary from reopening a decision on his own motion. To the contrary, 42 U.S.C. (Supp. III) 405(b)(1), which directs the Secretary to hold hearings upon request, also provides that "[t]he Secretary is further authorized, *on his own motion*, * * * to conduct such investigations and other proceedings as he may deem necessary or proper for the administration

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[4] SSA's intention to retain own-motion reopening authority under the current regulations is evident in other respects as well. For example, the *Office of Hearings and Appeals Handbook* explains that "[i]n certain situations there are equitable reasons for both the claimant and SSA for reopening a determination or decision after it has become 'final and binding' " (*id.* § 1-920). The *OHA Handbook* further states that an ALJ's decision may be reopened and revised by the ALJ on the ALJ's own motion or on the motion of a party and that "[a]n ALJ's decision may also be reopened and revised by the AC [Appeals Council]" (*id.* § 1-925; see also *id.* §§ 1-922-30 and 1-922-31). Moreover, the standard notice that was sent to petitioner informed him that the Appeals Council could review the ALJ's favorable decision on its own motion within 60 days and that even after 60 days the Appeals Council could reopen the decision if, inter alia, there was a clear error on the face of the evidence (Pet. App. 17a-18a).

of [the Act]" (emphasis added). Moreover, 42 U.S.C. 405(a) confers on the Secretary " 'exceptionally broad authority' " to establish implementing procedures, and those regulations must be sustained unless they are arbitrary and capricious. *Bowen* v. *Yuckert,* No. 85-1409 (June 8, 1987), slip op. 6-7 (quoting *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983)). At the very least, the reopening regulations at issue here are not an arbitrary or capricious means for implementing the Secretary's duty under 42 U.S.C. (& Supp. III) 405(b) to conduct investigations and proceedings on his own motion to ensure the "proper" administration of the Act.[5]

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[5] The First Circuit in *McCuin* suggested that due process concerns would be raised in some circumstances if the regulations were construed to permit the Secretary to reopen a decision on his own motion, because that interpretation would deprive administrative decisions of their finality. See 817 F.2d at 171-175. With all respect, we believe that the First Circuit's due process concerns are without merit, at least in the vast majority of cases to which the reopening regulations are applied. The analogous provisions for relief from judgment under Fed. R. Civ. P. 60(b) plainly do not violate the Due Process Clause merely because they may result in the reopening of a judgment that had become "final" when the time for taking an appeal expired. Furthermore, to the extent that the First Circuit was concerned about possible unfairness to a claimant as a result of the reopening of a decision after benefits were paid, any such unfairness may be remedied by waiver of recoupment of overpayments where recovery would defeat the purposes of the Act or "be against equity and good conscience." 42 U.S.C. 404(b). See *Califano* v. *Yamasaki,* 442 U.S. 682 (1979).

In any event, there can be no plausible claim in this case that the Appeals Council's reopening of the ALJ's decision violated petitioner's due process rights, especially since the notice transmitting the ALJ's decision specifically informed him of that possibility. In fact, petitioner does not appear to argue that his due process rights were violated; he merely quotes a passage from the *McCuin* decision that discusses certain due process issues as a general matter. See Pet. 11. It would, moreover, be premature for the Court to address any possible due process issues that could arise from particular applica-

Second, because the question on which the courts of appeals are divided concerns the interpretation of the Secretary's own regulations, that question can be conclusively resolved by the Secretary by amending the regulations, without any need for intervention by this Court. It was for this reason that the Solicitor General, with the concurrence of the Secretary, chose not to ask the Court to review the First Circuit's decision in *McCuin,* even though *McCuin* conflicted with decisions of other courts of appeals and was, in our view, clearly wrong. Instead, as the Sixth Circuit noted in *Fox* v. *Bowen,* the Secretary has formally announced his intention "to revise his regulations to make it clear that the Social Security Administration may reopen a final decision on its own initiative." Slip op. 7, citing 52 Fed. Reg. 14270 (1987); see also *id.* at 40296. When the regulations are revised, the circuit conflict regarding the interpretation of the current regulations will be of no continuing importance.

Third, petitioner was not subjected to any novel or unfair procedure in this case, because the decision below merely sustains the exercise of authority that has existed since 1940 and because petitioner was specifically notified in advance of that authority. The decision in *McCuin,* by contrast, did constitute a marked departure from past practice. The fact that the Secretary chose to forgo petitioning for certiorari in *McCuin*—and therefore chose to tolerate the curtailment of his reopening authority in the First Circuit pending his revision of the governing regulations—does not create any fundamentally unfair disparity in the treatment of claimants in different circuits. That is especially so in light of the discretionary nature of re-

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tions of the reopening regulations in other circumstances, especially in view of the Secretary's plans to revise those regulations.

opening (see *Califano* v. *Sanders*, 430 U.S. at 108) and the availability of other measures for correcting at least some errors even in the First Circuit—*e.g.*, by devoting more resources to screening ALJ decisions for possible own-motion review by the Appeals Council within 60 days, or by terminating benefits on the basis of a *new* decision rather than reopening and revising the original decision.

Fourth, the substantive basis for the reopening in this case likewise was neither unreasonable nor unfair to petitioner. The Appeals Council reopened the ALJ's decision because, as the district court observed, "the ALJ erred as a matter of law in characterizing [petitioner's] income for the years 1978 through 1980 as 'wages' " (Pet. App. 11a). Indeed, petitioner contended before the ALJ that he performed services for GMA not as an employee, but as a self-employed independent contractor (*id.* at 26a). And in 1980, petitioner "characterized his fixed salary as guaranteed payments and included the same in a Schedule K-1 'Partner's Share of Income' form" (*id.* at 11a n.4). Moreover, although petitioner now asserts (Pet. 14-15) that the ALJ's "findings of fact" support the notion that he was an employee of GMA, petitioner does not address the Appeals Council's holding, which was affirmed by the district court and court of appeals, that SSA is foreclosed as a matter of law from treating petitioner as an employee of his partnership. Because petitioner therefore has essentially conceded the correctness of that legal ruling, the effect of the court of appeals' holding on the reopening issue in this case is merely to protect the Secretary's ability to prevent petitioner from receiving old-age insurance benefits to which he is not entitled. That result presents no occasion for this Court to grant review.

g. Petitioner also suggests (Pet. 10, 12) that review is warranted because the decision below conflicts with the Eleventh Circuit's decision in *Butterworth*. However, there, as here, the court rejected the contention that the current regulations prohibit the Secretary from reopening a decision on his own motion. 796 F.2d at 1384-1385. To be sure, the Eleventh Circuit went on to hold in *Butterworth* that any reopening of an ALJ's decision after 60 days must be accomplished by the ALJ, not the Appeals Council. 796 F.2d at 1385-1389. In our view, however, this latter holding was clearly erroneous (see also *Cieutat*, 824 F.2d at 356-357 n.13), because the Appeals Council, from its inception in 1940, has had the authority to reopen an ALJ's decision. See 20 C.F.R. 403.711(b), as added, 5 Fed. Reg. 4174 (1940) (quoted at page 11, *supra*). Indeed, petitioner does not actually argue in favor of the *Butterworth* rule. In any event, the question of *which* component in SSA can exercise the Secretary's reopening authority is even less worthy of review at this time than is the question whether the Secretary has that authority at all under existing regulations. The allocation of reopening authority within SSA (and specifically to the Appeals Council) is a matter to be addressed in the Secretary's intended revision of the reopening regulations. See 52 Fed. Reg. 40296 (1987).

2. Petitioner argues (Pet. 13-14) that even if the Appeals Council is authorized to reopen an ALJ's decision after 60 days, the Appeals Council exceeded its authority in this case because the reopening was based on a determination that the ALJ erred as a matter of law in concluding that petitioner was an employee of GMA from 1978 to 1980. In petitioner's view, errors of law can be corrected only by direct review within 60 days under 20 C.F.R. 404.970(a)(2). However, petitioner's reliance on

that regulation is nothing more than a variant of his basic (albeit erroneous) contention that the Appeals Council's reopening authority is governed by the limitations on its review authority.

The relevant *reopening* regulation, 20 C.F.R. 404.989(a)(3), states that good cause for reopening will be found if an error clearly appears on the face of the evidence. Nothing in that provision suggests that reopening is limited to situations in which the ALJ committed a clear error of fact rather than law. Past administrative practice also refutes such a distinction, because the 1940 version of the reopening regulations expressly provided that a hearing decision could be revised on the Appeals Council's own motion "when it clearly appears that there was an error of fact or law in such decision" (20 C.F.R. 403.711(b), as added, 5 Fed. Reg. 4174 (1940)), and that practice has been followed ever since. See *OHA Handbook* § 1-922-30. Nor would such a distinction make sense: where the undisputed facts render the claimant ineligible under the Act itself, there is no reason to believe that the Secretary nevertheless intended to bind SSA to pay benefits out of the Trust Fund. In any event, petitioner's alternative construction of the reopening authority does not warrant this Court's attention, because it has not been adopted by any court of appeals and it was specifically rejected by the First Circuit in *McCuin* (817 F.2d at 171).[6]

3. Petitioner presents virtually no argument on the merits of the coverage issue. He does state in passing that

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[6] Contrary to petitioner's contention (Pet. 12, 14), the district court in *Call* v. *Heckler*, 647 F. Supp. 560 (D. Mont. 1986), did not hold that errors of law can never support own-motion reopening. The court held only that the Secretary cannot reopen a prior decision on the ground that the ALJ abused his discretion. See 647 F. Supp. at 562.

the ALJ's decision that he was an employee of GMA rested on "findings of fact." See Pet. 14-15. That observation is irrelevant, however, because the Appeals Council set aside the ALJ's decision not on the basis of any disagreement with his factual findings, but because of the ALJ's erroneous *legal* conclusion that a partner in petitioner's position may be treated as an employee of the partnership (Pet. App. 10a). As noted above (see pages 4-5, 15, *supra*), both courts below sustained this ruling by the Appeals Council, and petitioner does not address it here. There accordingly is no occasion for this Court to consider that issue.[7]

4. Finally, petitioner contends (Pet. 16-18) that the courts below should have decided whether he is entitled to quarters of coverage for employment prior to 1951.

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[7] Petitioner also does not challenge the rationale of the Appeals Council's decision after the case was reopened—*i.e.*, that petitioner was ineligible for quarters of coverage as a self-employed independent contractor because the only income derived by GMA (and therefore by petitioner) was rental income from real estate, which is specifically excluded from the definition of self-employment income under 42 U.S.C. 411(a)(1). See Pet. App. 37a. Petitioner does point out (Pet. 15) that the district court did not resolve the rental-income issue and instead affirmed the Appeals Council's decision on the ground that petitioner did not in any event have *net* self-employment income giving rise to covered quarters in 1979 and 1980. See Pet. App. 14a-15a. But petitioner likewise makes no effort to challenge this ruling by the district court. He merely observes (Pet. 15) that this ground for rejecting petitioner's claim was not discussed in the Appeals Council's decision. But it *was* discussed by the ALJ, who found that because of offsetting losses and expenses, petitioner had no net self-employment income if he was an independent contractor from 1978 to 1980 (Pet. App. 27a). The Appeals Council did not overturn that finding. As a result, the courts below did not dispose of the case on a ground that was rejected or not considered in the administrative proceedings. This factbound issue therefore does not warrant further review.

However, petitioner fails to answer the finding by the district court and court of appeals that this issue was not properly preserved in administrative proceedings (Pet. App. 2a-3a, 9a n.3). Moreover, as the district court observed, it makes no difference for present purposes whether petitioner should be credited with nine quarters of coverage for pre-1951 employment, because the exclusion of the eight quarters for 1979 and 1980 renders him ineligible for old-age insurance benefits in any event (Pet. App. 9a-10a n.3). Finally, the court of appeals made clear that its decision does not foreclose petitioner from seeking correction of his earnings records for years prior to 1951, pursuant to 42 U.S.C. (& Supp. III) 405(c) (Pet. App. 3a). Especially in the absence of any ruling by the courts below, petitioner's claims concerning his employment prior to 1951 do not warrant review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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